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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF DESCHUTES

6 JANET SPENCER,

7 Plaintiff,

Case No. 10CV05155T

8 v.

MEMORANDUM OPINION

9 GUARANTY BANK, FSB, a Wisconsin banking
10 corporation; MORTGAGE ELECTRONIC REGISTRATION
11 SYSTEMS, INC., a Delaware corporation; and
Defendants)

12 Plaintiff seeks to prevent the foreclosure¹ of a deed of trust she executed on April 16, 2003 and which was
13 recorded with the Deschutes County Clerk on April 18, 2003.²

14
15 Defendants Guaranty Bank FSB and Mortgage Electronic Registration Systems, Inc. have moved to dismiss
16 plaintiff's complaint for failure to state a claim.

17
18 Plaintiff filed her complaint and sought temporary and permanent injunctive relief and a declaratory
19 judgment after she received a Notice of Default and Election to Sell, Ex. 3, to the complaint. She makes no claim
20 that she is not in default nor that any requirement of ORS 86.735 is not met. She raises no material issue of fact.
21 The operative allegations are legal conclusions about the capacity of Mortgage Electronic Registration Systems to
22 act as a beneficiary.

23
24
25 ¹ Although the claim for injunctive relief seeks to prevent defendants from non-judicially
26 foreclosing the deed of trust, the declaratory relief claim seeks to prevent any foreclosure by the
defendants.

² Plaintiff neglected to attach a copy to the complaint but, with plaintiff's consent, the
court has taken judicial notice of the deed of trust at the request of defendants.

ORS 86.705 (1) defines "beneficiary" as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given...". Plaintiff designated Mortgage Electronic Registration Systems as the beneficiary when she accepted the benefits of the loan. The court is unpersuaded that Mortgage Electronic Registration Systems cannot act in that capacity, even if it is not the holder of the note.

Regarding this last point, plaintiff alleges she has not been provided with proof "demonstrating the transfer of the full and unencumbered interest in both the Note and Deed of Trust from the original lender (non-party GRL) to any person or entity". ¶ 16. Plaintiff believes that the trust deed can only be foreclosed if the note and trust deed are both held by the same person or entity and that she is entitled to proof. The court is again unpersuaded.³

The bottom line is that plaintiff seeks to retain ownership, apparently forever, of a property for which she has not paid nor even alleges that she intends to pay for. She has not stated a claim. Defendants' motions are granted. Defendants Guaranty Bank and Mortgage Electronic Registration Systems are dismissed with prejudice. Mr. Marshack should submit an order and a limited judgment. Defendants are entitled to costs.

Defendant Recontrust Company, N. A. has filed an answer and affirmative defenses but not a motion to dismiss. However, the court can find no allegation that directly challenges Recontrust Company's ability to act as successor trustee if the claims against Guaranty Bank and Mortgage Electronic Registration Systems are dismissed. A conference with counsel for plaintiff and Recontrust Company will be scheduled to discuss what further proceedings are appropriate.

DATED this 5 day of May, 2011

Stephen Tiktin
Circuit Judge Stephen N. Tiktin

³ Plaintiff is protected from suit on the note after non-judicial sale. ORS 86.770 (2).

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JOSEPHINE

DAVID M. BUCKLAND,

Plaintiff,

vs.

AURORA LOAN SERVICES,

Defendants.

Case No. 10 CV 1023

GENERAL JUDGMENT OF DISMISSAL

This matter having come before the Court on January 10, 2010 for oral argument on upon Defendant Aurora Loan Services' Motion to Dismiss, and the Court having conducted oral argument and having received and reviewed the argument and legal memoranda of the parties; and the Court having issued its opinion in open court;

And the Court having allowed Plaintiffs 20 days to replead and Plaintiff having failed to replead; NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Complaint be, and the same is, hereby dismissed with prejudice and Defendants shall be entitled to an award of their costs and disbursements against Plaintiff in an amount to be determined in accordance with ORCP 68.

DATED: 3-18, 2011

151 PAT WOLKE
JUDGE

Judgment- 1

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EXHIBIT

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1 Respectfully submitted:

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4 _____
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Judgment- I

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EXHIBIT

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10 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
11 **FOR THE COUNTY OF JOSEPHINE**

12 DAVID M. BUCKLAND,

13 Plaintiff,

Case No. 10 CV 1023

14 vs.

15 AURORA LOAN SERVICES,

16 Defendant.

17 **MEMORANDUM IN SUPPORT OF**
18 **MOTION TO DISMISS**

19 COMES NOW THE DEFENDANT AURORA LOAN SERVICES ("AURORA" or
20 "ALS") and respectfully move the Court to dismiss the Plaintiffs Complaint pursuant to ORCP
21 21(A)(8) because the Complaint fails to state ultimate facts sufficient to constitute a claim.

22 **I INTRODUCTION**

23 Plaintiff has admitted in his pleadings that he obtained a loan secured by real property:

24 "The Plaintiff did agree to sign a promissory note and Deed of Trust with the
25 Defendant..." See Complaint, Page 2. However, Plaintiff's pleadings have provided no further
substantive information as to this dispute. It is assumed that the property in question is the
property known as 221 Trevor Way, Grants Pass, OR 97526. The public record shows that a
Deed of Trust was recorded on November 29, 2006 as Instrument # 2006-024026. In said Deed
of Trust, Plaintiff conveyed to First American Title insurance Company of Oregon in trust and

Memo Motion to Dismiss - 1

M&H# OR10-8111

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EXHIBIT

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1 with the power of sale certain real property located in Josephine County, Oregon, known as 221
2 Trevor Way, Grants Pass, OR 97526, and described as Parcel 2 of Partition Plat No. 1994-1111
3 in Josephine County, Oregon. The named beneficiary of the Deed of Trust is MERS as a
4 nominee for American Mortgage Network, Inc., dba American Mortgages Network of Oregon, its
5 successors and assigns. It is assumed that Plaintiff's reference to a Deed of Trust, is to said
6 recorded instrument. His arguments can be summarized as follows:

- 7 1) The Defendant does not have standing because the Defendant failed to provide any
8 proof that they it has the authority to act on behalf of the Holder In Due Course which
9 can only be done by showing Plaintiff the original promissory note.
- 10 2) Defendant has lost its rights through Estoppel by Acquiescence.
- 11 3) MERS does not have the power to appoint the trustee
- 12 4) Plaintiff seeks to quiet title, and have his debt discharged as a result.

13 II ORCP 21(A)(8) STANDARD

14 Under Oregon Rules of Civil Procedure 21(A)(8), a case may be dismissed for failure to
15 state ultimate facts sufficient to constitute a claim. *ORCP 21(A)(8)*. "The issue is not whether
16 the Plaintiffs will ultimately prevail, but whether the party is entitled to offer evidence to support
17 the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)).
18 The non-moving party is entitled to have all inferences from the record viewed in his favor.
19 *Huang v. Claussen*, 147 Ore. App. 330 (Or. Ct. App. 1997). Nevertheless, "whatever the theory
20 of recovery, facts must be alleged which, if proved, will establish the right to recover." *Davis v.*
Tyee Industries, Inc., 295 Ore. 467, 479 (Or. 1983)

21 The Court will disregard any allegations that are conclusions of law and mere "recitation
22 of the elements of a particular claim for relief, without more, is not a statement of ultimate facts
23 sufficient to constitute that claim for relief." *Huang v. Claussen, supra*. "[N]othing passes as a
24 fact unless it is expressed in plain and concise language." *Harding v. Bell*, 265 Ore. 202, 209 (Or.
25 1973), *citing Baker Hotel v. Employees Local 161*, 187 Or 58, 64, 207 P2d 1129, 1132 (1949).

Memo Motion to Dismiss - 2

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1 "Plaintiffs is presumed to have stated his case as strongly as the facts will justify, and facts not
2 alleged will be presumed not to exist." *Harding, supra citing Windle, Adm'x et al v. Flinn et al*,
3 196 Or 654, 662, 251 P2d 136 (1952). Thus "[f]actual allegations must be enough to raise a
4 right to relief above the speculative level." *Williams ex rel. Tabiu v. Gerber Products Co.*, 523
5 F.3d 934, 938 (9th Cir.2008), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.
6 Ct. 1955, 167 L. Ed. 2d 929 (2007). The allegations must be more "than labels and conclusions,
7 and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic, Id. at*
8 555.

9 A claim has facial plausibility only when the Plaintiffs plead factual content that allows
10 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
11 *Id. at 556*. It asks for more than a sheer possibility that a defendant has acted unlawfully, *Id.*
12 Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops
13 short of the line between possibility and plausibility of 'entitlement to relief.'" *Id. at 557*. In
14 *Ashcroft v. Iqbal*, U.S., 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009), the Supreme Court explained
15 the analysis a court must take:
16

17 Two working principles underlie our decision... First, the tenet that a court must accept as
18 true all of the allegations contained in a complaint is inapplicable to legal conclusions.
19 Threadbare recitations of the elements of a cause of action, supported by mere conclusory
20 statements, do not suffice ...

21 Second, only a complaint that states a plausible claim for relief survives a motion to
22 dismiss ... [and] where the well-pleaded facts do not permit the court to infer more than the
23 mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that
24 the pleader is entitled to relief.'

25 In keeping with these principles, a court considering a motion to dismiss can choose to
begin by identifying pleadings that, because they are no more than conclusions, are not
entitled to the assumption of truth. While legal conclusions can provide the framework of a
complaint, they must be supported by factual allegations.

III ARGUMENT

THE ALLEGATIONS LACK LEGAL AND FACTUAL SUPPORT.

A THE PROMISSORY NOTE IS NOT REQUIRED IN A NON JUDICIAL FORECLOSURE

Plaintiff argues that Defendant is required as a pre condition to a non judicial foreclosure, to present Plaintiff with the original note to determine if the note has been endorsed to a "holder in due course." That is not the law. The general rule is that an "indorsement of a negotiable instrument is not within the meaning of a statute providing for the recording of assignments of mortgages and deeds of trust. *Hughes v. Kaw Inv. Co.*, 97 So. 465 (Miss. 1923). The Oregon Trust Deed Act, does not mention the promissory note and "does not require presentment of the Note or any other proof of 'real party in interest' or 'standing', other than the Deed of Trust." *Stewart v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 1055131 *12 (D. Or. 2010) (findings and recommendation of Magistrate Judge Papak *adopted* by Order dated March 19, 2010 by Judge Garr King). This is because the exercise of the power of sale, is not an action to sue on the note.

1) PLAINTIFF'S PROPERTY IS BEING FORECLOSED NOT THROUGH A JUDICIAL PROCEEDING BUT UNDER A POWER OF SALE AND IT IS THUS NOT AN ACTION TO RECOVER A JUDGMENT ON A DEBT.

It is not in dispute that Plaintiffs voluntarily executed a Note and Deed of Trust. This is often referred to as a mortgage. A mortgage is generally foreclosed through a judicial process. However, unlike a traditional Mortgage, a Deed of Trust maybe "foreclosed" through an auction sale instead of a court proceeding:

"[I]t confers upon a trustee the power to sell property securing an obligation under a trust deed in the event of default, without the necessity for judicial action."

Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp., 209 Or.App. 528, 149 P.3d 150 (Or.App. 2006) at 542, also *See Oregon Trust Deed Act (Act)*, ORS 86.705 to 86.795.

The holder of the beneficial interest, instructs the trustee/auctioneer to commence foreclosure proceedings by filing a notice of default. See ORS 86.735. Once that notice is recorded, a sale date is set and the auctioneer trustee then prepares a notice of such sale and provides notice to affected parties. The borrower has a right by statute, to reinstate his loan or pay it off prior to sale.

A sale under a power of sale, i.e. a sale by a trustee, "is not a judicial sale, although, ..., it is as valid and binding and has the same force and effect as a sale under a decree." 55 Am.Jur. 2d, Mortgages §694, p. 635, also see *Siuslaw Valley Bank, Inc. v. Christopher H. Canfield Associates, Oreg., Ltd.*, 64 Ore. App. 198, 201 (Or. Ct. App. 1983) ("statute [ORS 86.735] sets forth the circumstances under which a trustee may proceed by advertisement and sale; it does not govern judicial foreclosure of a trust deed.")

While the process is governed by statute, the authority to conduct such a sale is a matter of contract. It is the Grantor, i.e. Plaintiffs, that grants the power of sale upon default. Court's have universally upheld that contractual right:

There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as "trust deeds in the nature of mortgages," which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it... *Bell Silver & Copper Mining Co. v. First Nat. Bank of Butte*, 156 U.S. 470 at page 477, 15 S.Ct. 440 at page 443, 39 L.Ed. 497 at page 501

This is no different in Oregon. The right conferred upon the mortgagee by the mortgage is the right, upon default to have the mortgage foreclosed and the mortgaged property sold to satisfy his demand. *Schleef v. Purdy*, 214 P. 137, 140 (Or. 1923). If that right is written into the contract,

1 the borrower must expect that in the face of a breach, this remedy will be invoked. *Uptown*
2 *Heights Assocs. Ltd. Partnership v. Seafirst Corp.*, 320 Ore. 638, 645 (Or. 1995).

3 Plaintiff's theory, that foreclosure may not be commenced until Defendant produces the
4 note, is thus unfounded. Plaintiff has offered neither a rational why the original note would be
5 relevant in the foreclosure process nor even a single Oregon case to stand for the proposition that
6 Defendant must produce the note before commencing a (foreclosure) sale.¹

7
8 The exercise of the power of sale is not an attempt to collect funds from Plaintiffs:

9 Foreclosing on a trust deed is distinct from the collection of the obligation to pay
10 money...Payment of funds is not the object of the foreclosure action. Rather, the lender is
11 foreclosing its interest in the property.

12 ...
13 An important point here is that with a trust deed, the trustee possesses the power the sale
14 which may be exercised after a breach of the obligation for which the transfer in trust of
15 the interest in real property is security. Foreclosure by the trustee is not the enforcement
16 of the obligation because it is not an attempt to collect funds from the debtor.

17 *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)

18 Simply put, an "action to foreclose on the security does not constitute an action to recover
19 a judgment on the debt. *Wright v. Associates Financial Services Co.*, 59 Ore. App. 688, 693 (Or.
20 Ct. App. 1982). The Note is therefore irrelevant in this type of process. And it becomes clear
21 why Oregon's comprehensive non-judicial system simply does not require a foreclosing entity to
22

23 ¹ That is because no such cases exist. The cases that spawned this popular theory are cases from other
24 states that have exclusively *judicial* foreclosure systems, in which the foreclosing lender must prove in a court of law
25 that it has the capacity to sue, i.e. standing, to initiate court proceedings to foreclose. See e.g., *Newbeck v. Wash.*
Mut. Bank, 2010 U.S. Dist. LEXIS 3830 (N.D. Cal. Jan. 19, 2010)(rejecting popular cited cases such as *Landmark*
Nat'l Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (2009), because those cases do not apply to non-judicial
foreclosure sale statutes.)

The two cases most often cited are *Landmark*, supra, and *Bellistri v. Ocwen*, 284 S.W.3d 619 (Mo. Ct.
App. 2009). The issue in *Landmark* was whether in a judicial foreclosure the Plaintiff had to provide notice to
MERS, the named beneficiary on a junior deed of trust, in addition to the Lender. The issue in *Bellistri* was whether
Ocwen, a loan servicer, could challenge a tax deed under Missouri law in its own name, not whether Ocwen or
MERS had standing to exercise the contractual power of sale under the Deed of Trust. Also see *Mortgage Elec.*
Registration Sys. v. Bellistri, 2010 U.S. Dist. LEXIS 67753 (E.D. Mo. July 1, 2010)(MERS in fact has standing to
foreclose and the tax deed was issued subject to the interest of MERS).

1 "produce the note" upon demand by the borrower: "Foreclosure by the trustee is not the
2 enforcement of the obligation because it is not an attempt to collect funds from the debtor." *Id.*
3 Nowhere in the Deed of Trust, Note, or in the Oregon foreclosure statutes, is there a requirement
4 to produce the promissory note or show physical possession to commence the sale. Plaintiffs
5 have provided no authority and no rational for the thesis that a foreclosure conducted pursuant to
6 ORS 86.705 through 86.795, also needs to comply with the requirements for a judicial
7 foreclosure. This is then simply a renewed attack on the statutory foreclosure scheme as
8 provided for in ORS 86.705 et.seq., which has already been upheld by the Oregon courts based
9 on constitutional challenges. *Wright, supra* at 693. There is no doubt that "[n]o requirement
10 exists under the statutory framework to produce the original note to initiate non-judicial
11 foreclosure." *Pantoja, supra*, at 15². Therefore, the absence of an original promissory note in a
12 non-judicial foreclosure does not render a foreclosure invalid." *Candelo v. NDEX West, LLC*,
13 2008 U.S. Dist. LEXIS 105926 (E.D. Cal. Dec. 23, 2008); *Neal v. Juarez, No. 06-0055, 2007 WL*
14 *2140640*, 8 (S.D. Cal. July 23, 2007) (citing *R.G. Hamilton Corp. v. Corum*, 218 Cal. 92, 97
15 (1933); *California Trust Co. v. Smead Inv. Co.*, 6 Cal. App. 2d 432, 435 (1935)).
16
17
18
19

20
21 ² also see *Contreras v. U.S. Bank*, 2009 U.S. Dist. LEXIS 121944, 2009 WL 4827016 (D. Ariz.
22 2009), *Rodriguez v. Litton Loan Servicing LP*, No. 09-00029, 2009 WL 1326339, 6 (E.D. Cal. May
23 12, 2009); *Candelo v. NDEX West, LLC*, No. 08-1916, 2008 U.S. Dist. LEXIS 105926, 12 E.D. Cal.
24 Dec. 23, 2008) (same); *Farahani v. Cal-Western Reconveyance Corp.*, No. 09-194, 2009 WL
25 1309732, 2 (N.D. Cal. May 8, 2009) ("[P]ossession [of the note] is not required for a non-judicial
foreclosure.") *San Diego Home Solutions, Inc. v. Reconstrust Co.*, No. 08-1970 L, 2008 U.S. Dist.
LEXIS 99684, 5 (S.D. Cal. Dec. 10, 2008) Also see *Candelo v. NDEX West, LLC*, No. CV F 08-1916,
2008 U.S. Dist. LEXIS 105926, 2008 WL 5382259, at 4 (E.D. Cal. Dec. 23, 2008), *Puttkuri v.*
Reconstrust Co., No. 08cv1919, 2009 U.S. Dist. LEXIS 32, 2009 WL 32567, at 2 (S.D. Cal. Jan. 5,
2009).

1 2) A SERVICER MAY ACT AS THE AGENT FOR THE OWNER OF THE
2 LOAN IN INSTRUCTING THE TRUSTEE TO COMMENCE
3 FORECLOSURE.

4 Plaintiff's argument also relies on a deliberate confusion between principal and agent. As its
5 name indicates, Aurora Loan Services, is a loan servicer. It does not claim to be the principal.

6 A loan Servicer acts as the agent of the principal in enforcing the promissory note and deed
7 of trust. Servicing authority implies authority to initiate foreclosures if necessary. As Judge
8 Posner has stated "[e]very mortgage needs someone to collect the borrower's monthly payments
9 ... and if necessary foreclosing the mortgage." *CWCapital Asset Mgmt., LLC v. Chi. Props., LLC*,
10 610 F.3d 497, 501 (7th Cir. Ill. 2010). *The Financial Real Estate Handbook*, 3rd Ed.(1994),
11 defines "servicing" or "mortgage servicing" as

12 [c]ontrolling the necessary duties of a mortgagee, such as collecting payments, releasing the
13 lien upon payment in full, **foreclosing if in default**, and making sure the taxes are paid,
14 Insurance is in force, etc. Servicing may be done by the lender or a company acting for the
15 lender, for a servicing fee. (emphasize added)

16 The Federal Trade Commission uses a similar explanation in its *The Real Estate Marketplace*

17 *Glossary: How to Talk the Talk:*

18 **Servicer:** A firm that performs servicing functions, including collecting mortgage
19 payments, paying the borrower's taxes and insurance and generally managing borrower
20 escrow accounts.

21 **Servicing:** The tasks a lender performs to protect the mortgage investment, including the
22 collection of mortgage payments, escrow administration, and **delinquency management**.

23 www.ftc.gov/bc/edu/pubs/consumer/homes/zrea03.pdf

24 These obligations to service the loan remain with the loan servicer, and do not get
25 transferred upon the sale of the note:

26 **20. Sale of Note; Change of Loan Servicer; Notice of Grievance....** If the Note is sold
27 and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the
28 Note, the mortgage loan servicing obligations to Borrower will remain with the Loan
29 Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note
30 purchaser unless otherwise provided by the Note purchaser...

1 A mortgage servicer has standing to sue in his own name. *CWCapital Asset Mgmt., LLC*
2 *v. Chi. Props., LLC*, 610 F.3d 497, 501 (7th Cir. Ill. 2010), relying on *Sprint Communications*
3 *Co. v. APCC Services, Inc.*, 554 U.S. 269, 128 S. Ct. 2531, 2541, 171 L. Ed. 2d 424 (2008), also
4 see *Sturgis v. Baker*, 43 Ore. 236, 243 (Or. 1903) (“[I]n law a collecting bank is the agent of the
5 holder of the note...”).
6

7 **3) THE STANDING DOCTRINE DETERMINES THE CAPACITY TO SUE NOT**
8 **THE CAPACITY OF DEFENDANT TO EXERCISE CONTRACTUAL**
9 **REMEDIES**

10 Plaintiff is attempting to convert a shield protecting Defendants from multiple lawsuits
11 into a cause of action, and thus a sword for Plaintiff. His argument regarding standing confuses
12 the judicial foreclosure process used in a regular mortgage, with the contractual right of sale
13 which is used to “foreclose” a Deed of Trust. In his complaint he wants to in fact force Defendant
14 to show they have standing to foreclosure their interest in the real property, to in effect bring a
15 mortgage foreclosure suit. However it is not upon the Defendant to proof they have standing, but
16 on the Plaintiffs to show that the named Defendant has no power to foreclose. *First Nat’l Bank v.*
17 *Malady*, 242 Ore. 353, 357 (Or. 1965) (In declaratory judgment cases, the plaintiff initiating the
18 action and who makes affirmative allegation must bear the burden of proving what he alleges).

19 Plaintiffs’ understanding of the theory of Standing is simply wrong. The term
20 “justiciable”--along with its companion terms “standing,” “mootness,” and “ripeness”... are, in
21 brief, judicial constructs, developed first in reference to the “judicial power” conferred on federal
22 courts under Article III of the United States Constitution and later adopted by the Oregon courts
23 in reference to the “judicial power” conferred under Article VII (Amended) of the state
24 constitution. *Utsey v. Coos County*, 176 Ore. App. 524, 529 (Or. Ct. App. 2001).
25

1 Standing thus focuses on the Plaintiffs' standing, not the Defendant's. What is at issue is
2 the capacity to sue not the capacity to be sued.

3 In addition to this constitutional standing doctrine, there is also an element of "prudential
4 standing." *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004). This is also referred
5 to as the real party in interest doctrine. The real party in interest doctrine is for the benefit of a
6 party defendant to protect that defendant from multiple suits. *Pacific Coast Agricultural Export*
7 *Asso. v Sunkist Growers, Inc.* (1975, CA9 Cal) 526 F2d 1196, 1975-2 CCH Trade Cases P 60617,
8 *cert den* (1976) 425 US 959, 96 S Ct 1741, 48 L Ed 2d 204.

9 **(a) THE STATUTORY PROCESS PROTECTS PLAINTIFF AGAINST BEING**
10 **HARASSED TWICE FOR THE SAME CAUSE.**

11 The Oregon Supreme Court explained the general rationale for the real party in interest
12 rule succinctly a century ago:

13 The statute requiring that every action shall be prosecuted in the name of the real party in
14 interest was enacted for the benefit of a party defendant, to protect him from being again
15 harassed for the same cause. But if not cut off from any just offset or counterclaim
16 against the demand, and a judgment in behalf of the party suing will fully protect
17 him when discharged, then is his concern at an end. This is the test as to whether such
18 a defense is properly interposed...

19 *Sturgis v. Baker*, 43 Ore. 236, 240 (Or. 1903) (internal citations omitted)(emphasize
20 added)

21 As the *Sturgis* court explained, the test of standing is whether the party raising standing is being
22 protected from "being again harassed for the same cause." *Sturgis, supra*. If a "judgment in
23 behalf of the party suing will fully protect him when discharged, then is his concern at an end."

24 *Id.* The proper focus of the rule is to determine whether the party seeking its shelter is protected
25 from contrary or subsequent claims. The rule looks at the process to determine whether a

1 decision will protect the defendant against subsequent actions. It is not a rule to make contractual
2 obligations unenforceable.

3 A non judicial foreclosures under a power of sale und the applicable statutes provides
4 procedural "due process." *See Wright, supra*. In addition to the notice provisions, ORS 86.770
5 specifically provides protection for the Plaintiff from being "harassed" twice for the same debt by
6 limiting a creditors remedy to the sale of the property. Pursuant to subsection 2, after a
7 foreclosure sale, no action for a deficiency may be brought against Plaintiff. In other words, the
8 foreclosure sale is the sole remedy of a "Creditor," at least with respect to residential mortgages
9 and deeds of trust. As discussed below, that Creditor is bound by the acts of its foreclosing
10 agents with respect to the outcome of the foreclosure. Plaintiff is thus protected from "being
11 again harassed for the same cause" by the very nature of the non-judicial foreclosure process.

12 The argument that Plaintiff needs to institute a declaratory action to protect herself from a
13 civil "double jeopardy" is therefore a red herring.
14

15 **4) THOSE THAT SEEK EQUITY MUST DO EQUITY – PLAINTIFFS CANNOT**
16 **SEEK RESCISSION OR OTHERWISE CHALLENGE A "WRONGFUL**
17 **FORECLOSURE" WITHOUT TENDERING OR OFFERING TO TENDER**
18 **THE LOAN PROCEEDS.**

19 While many of Plaintiffs' claims are aimed at rescinding the subject loan transactions,
20 nowhere in the Complaint does Plaintiff allege that he is able and willing to tender the money he
21 has borrowed.

22 That is a vital element to Plaintiff's cause of action. Generally, a court of equity will not
23 interfere in the absence of some fraud or improper practice *Johnson v. Feskens*, 146 Ore. 657,
24 661 (Or. 1934). And, "he who seeks equity must do equity." *Jensen v. Probert*, 174 Ore. 143,
25 149 (Or. 1944). So for example, to have a court determine that an "equitable mortgage" exists,

1 tender must be alleged. *Marshall v. Williams*, 21 Ore. 268, 275 (Or. 1891), also see, *Stations*
2 *West, LLC v. Pinnacle Bank of Oregon*, 338 Fed. Appx. 658, 660 (9th Cir.
3 2009)(unpublished)(Plaintiff failed to allege it could remedy notice of default.) This is because
4 there can be no wrongful foreclosure unless the debt was not due. *Collins v. Union Fed. Sav. &*
5 *Loan Ass'n*, 99 Nev. 284, 304 (Nev. 1983) ("material issue of fact in a wrongful foreclosure claim
6 is whether the trustor was in default when the power of sale was exercised.")

7 Moreover, a party seeking to stop or reverse foreclosure proceedings must first make a
8 "valid and viable tender [offer] of payment of the indebtedness." *Karlsen v. American Sav. &*
9 *Loan Assn*, 15 Cal. App. 3d 112, 117 (2d Dist. 1971); *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal.
10 *App. 3d* 575, 578 (2d Dist. 1984) ("an action to set aside a trustee's sale for irregularities in sale
11 notice or procedure should be accompanied by an offer to pay the full amount of the debt for
12 which the property was security."); see also *Keen v. Am. Home Mortgage Svcg, Inc.*, No. 2:09-
13 cv-01026-FCD-KJM, Docket No. 36, slip op. at p. 22 (E.D. Cal. Oct. 21, 2009) (dismissing
14 wrongful foreclosure claim on the ground that the Plaintiffs failed to allege that they had
15 tendered, or at minimum, that they was able and willing to tender, the loan proceeds), *Stations*
16 *West, supra*.

17
18 The bottom line is that Plaintiffs must be able to return the funds they borrowed before
19 they can rescind this loan, even if they could prove they were entitled to rescind. Thus, as a
20 threshold matter, if the Plaintiffs are unwilling or unable to rescind, it makes little difference
21 whether they are entitled to do so.

22 **B MERS HAS THE POWER TO APPOINT A SUCCESOR TRUSTEE**

23 **1) AN OVERVIEW OF MERS.**

24
25

1 MERS is an electronic registration system that was created in the aftermath of the 1993
2 savings and loan crisis. *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487, 490 (Minn.
3 2009); see also *Bucci v. Lehman Brothers Bank, FSB*, No. 09-3888, 2009 R.I. Super, LEXIS 110,
4 8 (Aug. 25, 2009); *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81, 83 (N.Y. 2006). It was created
5 by the Mortgage Bankers Association, Fannie Mae, Freddie Mac, the Government National
6 Mortgage Association, the Federal Housing Administration, and the Department of Veterans
7 Affairs. Gerald Korngold, *Legal and Policy Choices in the Aftermath, of the Subprime and*
8 *Mortgage Financing Crisis*, 60 S.C. L.Rev. 727, 741-43 (2009).

9 MERS does not own loans, nor does it claim to own loans - MERS simply serves as
10 beneficiary in a nominee capacity for the note owner, pursuant to the contractual relationship
11 between MERS and the note owner. The borrower is notified of this relationship and agrees to
12 the same because it is the borrower who executes the mortgage or deed of trust naming MERS as
13 mortgagee or beneficiary.
14

15 **2) MERS' LEGAL RIGHT TO ENFORCE THE DEEDS OF TRUST.**

16 **1. PLAINTIFFS CONTRACTUALLY AGREED THAT MERS WOULD**
17 **SERVE AS NOMINEE FOR THE LENDER AND ITS ASSIGNS AND**
18 **BENEFICIARY UNDER THE DEED OF TRUST.**

19 The Deed of Trust states, in relevant part, that "MERS is a separate corporation that is acting
20 solely as nominee for Lender and Lender's successors and assigns. *MERS is the beneficiary*
21 *under this Security Instrument.*" See Instrument # _____ on _____
22 records of _____, Exhibit 101, Motion for Judicial Notice (hereafter Exhibit
23 101). Further, in the Deed of Trust, Plaintiff acknowledges and agrees that "[t]he beneficiary of
24 this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and
25 assigns) and the successors and assigns of MERS." (*Id.* at p. 3). Thus, not only did Plaintiff agree

1 that MERS would be designated as the nominee for the Lender and the beneficiary under the
2 Deed of Trust, Plaintiffs agreed that

3 MERS holds only legal title to the interests granted by Borrower in this Security Instrument,
4 but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's
5 successors and assigns) has the right: to exercise any or all of these interests, including but
6 not limited to, the right to foreclose and sell the property; and to take any action required of
7 Lender including, but not limited to, releasing and canceling this Security Instrument." (*Id.* at
8 3).

9 The above cited language makes clear that the Deed of Trust contractually authorizes MERS to
10 enforce the Deed of Trust on behalf of the Lender and its successors and assigns. See e.g. *Blau v.*
11 *America's Servicing Co.*, 2009 U.S. Dist. LEXIS 90632 (D. Ariz. Sept. 28, 2009). This includes
12 the power to initiate foreclosure. That power, once granted cannot be unilaterally revoked by the
13 Grantor. See. 55 Am. Jur. 2d Mortgages §689. For these reasons alone, Plaintiffs' argument
14 fails.

15 3) MERS WAS A VALID BENEFICIARY UNDER THE DEED OF TRUST

16 *Oregon Revised Statutes* ("ORS") Chapter 86.705 *Trust Deeds – Definitions* states that a
17 deed of trust beneficiary "means the person named or otherwise designated in a trust deed as the
18 person for whose benefit a trust deed is given, or the person's successor in interest..." This
19 statute was quoted by Justice Henry C. Breithaupt of the Clackamas County Circuit Court in a
20 written decision awarding attorney's fees to MERS related to MERS' defense of an action
21 brought by the plaintiff seeking a judicial determination of the priority of plaintiff's construction
22 lien. Parkin Electric, Inc. v. Saftencu, et al Clackamas County Circuit Court No. LV08040727
23 (March 12, 2009). A copy of the Court's decision is attached hereto as **Exhibit "A"**. The Court
24 awarded summary judgment to MERS finding that its mortgage lien had priority over the
25 plaintiff's construction lien and MERS then applied to the Court for an award of attorney's fees.

1 The plaintiff opposed MERS' application claiming MERS was not the real party in interest to ask
2 for an award of attorney's fees and was not entitled to seek the benefit of Oregon's lien statutes.

3 In the Parkin Electric decision the Court held that MERS by virtue of its' position as
4 beneficiary of the deed of trust encumbering co-defendant, Saftencu's real property, was a real
5 party in interest to the construction lien action and therefore was entitled to seek attorney's fees
6 from the plaintiff. The Court found that the parties to the deed of trust contract i.e. the borrower,
7 MERS and the original lender agreed "that MERS could and would act as, in effect, agent for the
8 original lender and any later holder of the rights of the original lender". Parkin Electric at page 4.
9 The Court held that Oregon recording statutes "do not prevent agency arrangements as agreed
10 upon among borrowers, lenders, trustees and beneficiaries" and that MERS as beneficiary and
11 mortgagee according to Oregon's mortgage laws was entitled to the protection of Oregon's lien
12 statutes, *ORS Chapter 87*. See Parkin Electric at page 5 and *ORS Chapter 86.715*. The Court went
13 on to point out in its decision that the plaintiff failed to provide certain notices to MERS in
14 violation of Oregon law because MERS' interest in the deed of trust (even as nominee for the
15 original lender) was recorded and known to the plaintiff and thus MERS was entitled to notice
16 pursuant to the notice provisions of Oregon's lien statutes. See Parkin Electric at page 5, "The
17 notice provisions in the lien statutes do not direct notices be given to lenders but rather direct that
18 they be given to "mortgagees". Parkin Electric at page 5.

20 The Court granted MERS application for fees and costs finding that the plaintiff in its
21 original action and in its opposition to MERS' application for fees could not establish "that
22 MERS was not the beneficiary of a trust deed or that MERS was somehow disabled from making
23 an assertion that it was a beneficiary of a trust deed." Similar to what the Delaneys are doing in
24 this present action i.e. challenging MERS ability to be the beneficiary of their Deed of Trust and
25

1 the validity of MERS' 2008 assignment to IndyMac Federal Bank, the Court in Parkin Electric
2 found that the plaintiff chose to "act as a private attorney general" and "go on a crusade" against
3 the contractual practices that lenders, borrowers, and MERS have chosen to use, practices which
4 "are not proscribed by [Oregon] law." Parkin Electric at page 6.

5 In Stewart v. Mortgage Electronic Registration Systems, Inc. et al, 2010 WL 1055131 (D.
6 Or. Feb. 9, 2010)(Findings and Recommendations adopted in their entirety and final judgment
7 entered on March 19, 2010) Magistrate Judge Papak held that a MERS deed of trust assignment
8 gave the foreclosing party (assignor of the MERS deed of trust assignment) standing to foreclose
9 and the power and authority to appoint a successor trustee. In the Stewart case MERS was the
10 original beneficiary of the deed of trust until it assigned its interest in the deed of trust to U.S.
11 Bank National Association ("U.S. Bank"). Subsequent to the MERS assignment U.S. Bank
12 initiated non-judicial foreclosure proceedings against the plaintiff/borrower, Stewart. Stewart
13 challenged the standing of U.S. Bank to foreclose claiming that neither U.S. Bank nor the
14 successor trustee were real parties in interest. The Court found that U.S. Bank was the real party
15 in interest as the successor to the MERS deed of trust and had the standing to appoint a successor
16 trustee and foreclose. Judge Papak stated that the Oregon Deed of Trust Act "does not require
17 presentment of the Note or any other proof of "real party in interest" or "standing", other than the
18 Deed of Trust." Id. at *12. Judge Papak concluded that whereas MERS' assignment of interest
19 and the appointment of a successor trustee were properly recorded, the defendants fully complied
20 with the Oregon Trust Deed Act and had standing to foreclose the plaintiff's property. Stewart at
21 *12. Thereafter, Judge King adopted Judge Papak's decision in full. Stewart v. MERS, 2010 WL
22 1054775 (D. Or. Mar. 19, 2010).
23
24
25

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M&H# OR10-8111

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1 Similar to the Stewart Court, courts throughout the Ninth Circuit including Courts in
2 California, Arizona, and Washington have also held that under their particular states recording,
3 lien and foreclosure laws MERS is a valid beneficiary of a deed of trust and has the power and
4 authority to assigns its beneficial interests in a deed of trust to a third party. See Derakhshan v.
5 Mortgage Electronic Registration Systems, Inc., 2009 U.S. Dist. LEXIS 63176 (C.D.
6 Cal.)(MERS motion to dismiss plaintiff's amended complaint as to claims for injunctive relief
7 and fraud against MERS and foreclosing lender granted) "MERS is the named beneficiary in the
8 Deed of Trust. By signing the Deed of Trust, Plaintiff agreed that MERS would be the
9 beneficiary and act as nominee for the lender...Plaintiff explicitly authorized MERS to act as
10 beneficiary with the right to foreclose on the property. Plaintiff is clearly not entitled to injunctive
11 relief based on MERS' standing" Derakhshan at 18; and Ciardi v. The Lending Company, 2010
12 WL 2079735 (D. Ariz.)(MERS motion to dismiss plaintiffs' first amended complaint granted and
13 plaintiffs' application for temporary and permanent injunction (to stop non-judicial foreclosure
14 sale) denied)"The deed of trust, as quoted, in Plaintiffs' amended complaint, designates MERS as
15 the beneficiary and authorizes MERS to take any action to enforce the loan, including the right to
16 foreclose and sell the property. To the extent Plaintiffs rely on a theory that the beneficiary must
17 have an interest in the actual note, Plaintiffs have failed to cite any law so requiring. Further,
18 Plaintiffs have failed to allege any facts or otherwise explain how the mere listing of MERS as
19 the beneficiary renders the deed of trust invalid". Ciardi at 3-4

21 In Vawter v. Quality Loan Service Corporation of Washington, et al, Case No. C 09-
22 1585JLR (W.D. Wash.), the Court granted MERS and the loan servicer's motion for judgment on
23 the pleadings finding that MERS is a proper deed of trust beneficiary under Washington law. The
24 Court declined to accept the Vawters' arguments that MERS cannot be a beneficiary of a deed of
25

1 trust in Washington. The Vawter Court quoted from its 2008 decision in Moon v. GMAC
2 Mortgage Corp., No. C08-969Z, 2008 WL 4741492 (W.D. Wash. Oct. 24, 2008) finding that
3 “[s]imply because MERS registers documents in a database does not prove that MERS cannot be
4 the legal holder of an instrument.”

5 Under Oregon law and the laws of other non-judicial foreclosure states in the Ninth
6 Circuit, MERS is a valid beneficiary of a deed of trust and it has the authority and power to
7 transfer its interest in a deed of trust to a third-party, permitting that third-party to foreclose on a
8 deed of trust in the State of Oregon.

9 In this matter the plaintiff consented to MERS being the beneficiary of hisr Deed of Trust
10 when the executed the same. He agreed to enter into the home loan transaction with the
11 originating lender IndyMac Bank. MERS as the beneficiary of the Deed of Trust was the
12 agent/nominee of IndyMac Bank. Oregon law does not prohibit MERS from being the
13 beneficiary of the Plaintiffs’ Deed of Trust.
14

15
16 **A ESTOPPEL BY ACQUIESCENCE**

17 Plaintiff also alleges that he should not be foreclosed upon because of the doctrine of
18 “Estoppel by Acquiescence.” Estoppel is an equitable principle that precludes someone from
19 exercising a right to another's detriment if the right holder, through words or conduct, has led the
20 other to believe that the right would not be exercised. *Daly v. Fitch*, 70 Ore. App. 18, 22 (Or. Ct.
21 App. 1984). The doctrine does not apply, even if Plaintiff’s own inequitable conduct, discussed
22 above, is ignored.

23 Acquiescence implies active consent. *Tillamook Country Smoker v. Tillamook County*
24 *Creamery Ass’n*, 311 F. Supp. 2d 1023, 1031 (D. Or. 2004). Mere silence or “passive
25 acquiescence,” does not produce an estoppel. *Molalla v. Coover*, 192 Ore. 233, 249 (Or. 1951),

1 citing *Fraser v. Portland*, 81 Or. 92, 158 P. 514. Generally, estoppel by acquiescence requires 4
2 elements, (1) "unreasonable and inexcusable delay" coupled with (2) affirmative conduct which
3 (3) induces the belief that a claim has been abandoned and (4) detrimental reliance. *Adidas Am.,*
4 *Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1075 (D. Or. 2008). There is no
5 argument that there was any affirmative conduct by Defendant to lead the Plaintiff to believe that
6 he no longer had to pay his mortgage obligation. Instead, the Complaint alleges affirmative
7 conduct on part of the Plaintiff to artificially create an argument for the estoppel. This is simply
8 another case where an equitable defense is turned on its head and turned into a sword to avoid
9 having to deal with the consequences of not repaying a mortgage loan.

10 IV CONCLUSION

11
12 There is no question that there is a mortgage crisis, and while John F Kennedy famously saw
13 opportunity in every crisis, there are also opportunists in every such crisis. There are those that
14 pray on the hopes and fears of mortgagors that no longer can afford their mortgages, that promise
15 something for nothing, that conjure away debt as by magic. The internet is full of websites that
16 promise to magically make mortgage debt go away. They provide case citations, "legal
17 advice"(with the big disclaimer that it is not legal advice) and in some instances pleading
18 templates. Those conjurers of cheap tricks, however, do not provide a service to anyone. Their
19 case law citations are misleading and incomplete. They cobble together unrelated doctrines in
20 isolation to build elaborate circular arguments. They provide false hope, clog up the judicial
21 system with frivolous complaints, and perpetuate uncertainty at a time where certainty is badly
22 needed. Foreclosure is an unfortunate reality in this economy, but it is also a necessary reality.
23 Without a clear and predictable remedy, there is no mortgage lending. Without lending there is
24 no one to buy, sell or built homes.
25

1 Plaintiff may not be to blame for pinning his hopes on such websites, but he cannot argue
2 away the cold hard fact that he has not paid his mortgage as agreed, and that when he entered into
3 the bargain he also agreed that this failure would result in a non-judicial sale of his real property.
4

5 DATED: October 21, 2010

MCCARTHY & HOLTHUS LLP

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9 Holger Uhl, OSB# 950143
Attorney for Defendant
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Memo Motion to Dismiss - 20

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22

CERTIFICATE OF SERVICE

I certify that on _____, 2010, I served a copy of the foregoing document by first class mail on the following:

GRANT W. RICHARDS AND
JULIE L. RICHARDS
41546 Washington Gulch Road,
Baker City, Oregon 97814

Rochelle L. Stanford
Pite Duncan , LLP
4375 Jutland Drive, Suite 200
San Diego, CA 92117

_____ U. S. Mail, Postage Prepaid
_____ Hand Delivery
_____ Overnight Mail
_____ Via Facsimile
_____ U. S. Mail, Postage Prepaid
_____ Hand Delivery
_____ Overnight Mail
_____ Via Facsimile 619-326-2430

Of the Firm
McCarthy & Holthus, LLP
19735 10th Ave NE, Suite N200
Poulsbo, WA 98370

the information shown on the MERS® System and the information in the public records, the Member shall promptly correct the information on the MERS® System.

(b) At or prior to the time a Member registers a mortgage loan on the MERS® System, such Member shall provide evidence reasonably satisfactory to MERS demonstrating that Mortgage Electronic Registration Systems, Inc. is, or as soon as practicable shall be, properly recorded as mortgagee of record in the appropriate public records with respect to such mortgage loan.

(c) Mortgage Electronic Registration Systems, Inc. shall not act as mortgagee of record for the purpose of procuring borrowers for the Member or making mortgage loans on behalf of the Member.

(d) Reference herein to "mortgage(s)" shall include deed(s) of trust, and any other form of security instrument under applicable state law. References herein to "mortgagee of record" shall include the named beneficiary under a deed of trust in those jurisdictions where deeds of trust are used to secure loans, and any similar status as used in connection with any other form of security instrument under applicable state law.

Section 6. MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes. In the absence of contrary instructions from the beneficial owner, MERS and Mortgage Electronic Registration Systems, Inc. may rely on instructions from the servicer shown on the MERS® System in accordance with these Rules and the Procedures

FILED 11 MAY 25 9 50 USC-ORD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

IVAN HOOKER and KATHERINE
HOOKER,

Plaintiffs,

Civ. No. 10-3111-PA

ORDER

v.

NORTHWEST TRUSTEE SERVICES,
INC.; BANK OF AMERICA, N.A.;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

Defendants.

PANNER, J.

Before the court is a motion to dismiss (#8) and request for judicial notice (#6) by Bank of America, N.A. and Mortgage Electronic Registration Systems, Inc. (MERS).¹ Defendants' request for judicial notice is GRANTED. Defendants' motion to dismiss is DENIED. Plaintiffs' request for a declaratory judgment is GRANTED.

¹Plaintiffs dismissed their claims against Northwest Trustee Services, Inc (Northwest).

BACKGROUND

Except where noted, the following background is from the complaint or judicially noticeable materials.

On November 17, 2005, plaintiffs obtained a loan from GN Mortgage, LLC. A trust deed secured the loan. The note and trust deed list GN as the lender. The trust deed lists MERS as the beneficiary. MERS is not listed on the note. The trust deed lists Regional Trustee Services Corp. as trustee. On November 23, 2005, the trust deed was recorded in the Jackson County land records.

In September 2009, plaintiffs defaulted. On May 3, 2010, MERS assigned the trust deed to Bank of America. Also on May 3, MERS appointed Northwest successor trustee. That same day, Northwest executed a notice of default and election to sell. On May 7, 2010, defendants recorded the May 3 assignment of the trust deed, appointment of successor trustee, and notice of default and election to sell.

On September 7, 2010, plaintiffs filed the complaint in state court. On September 13, 2010, Wells Fargo Bank, N.A., as attorney in fact for Bank of America, appointed Northwest successor trustee. On September 16, 2010, Northwest executed a rescission of the notice of default recorded on May 7, 2010. Also on September 16, 2010, Northwest executed a second notice of default and election to sell. On September 20, 2010, defendants recorded the September 16, 2010 appointment, rescission, and

second notice of default.

On October 7, 2010, defendants removed the case to this court. On January 19, 2011, pursuant to my order, defendants submitted a complete chain of title for the note and trust deed. Defendants' chain of title included a copy of a January 3, 2011 "MIN Summary and Milestones." (Jan. 31, 2011 McCarthy Decl., Ex. 1, 1-2.) The MIN Summary is how MERS members track transfers of servicing and ownership rights of loans within the MERS system. According to the MIN Summary, on December 9, 2005, Guaranty Bank, FSB transferred the beneficial interest in the trust deed to Wells Fargo Home Mortgage. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 1-2.) Although Guaranty Bank appears to have been the original servicer of the loan, the record is silent as to how or when Guaranty Bank obtained the beneficial interest in the trust deed.

On December 14, 2005, Guaranty Bank transferred the servicing rights to Wells Fargo Home Mortgage. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) On July 15, 2006, Wells Fargo Home Mortgage transferred the beneficial interest in the trust deed to Bank of America. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) Defendants did not record the transfer of the beneficial interest in the trust deed from Guaranty Bank to Wells Fargo or from Wells Fargo to Bank of America in the Jackson County land records. As noted above, defendants did record a May 3, 2010 assignment of the trust deed from MERS to Bank of America.

STANDARDS

On a motion to dismiss, the court reviews the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). This review is generally limited to the allegations in the complaint, exhibits attached to the complaint, and judicially noticeable materials. Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient facts that "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). This plausibility standard requires the pleader to present facts that demonstrate "more than a sheer possibility" that defendant is liable for the alleged misconduct. Id.

In considering a motion to dismiss, a court must distinguish between the factual allegations and legal conclusions asserted in the complaint. Id. All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. American Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002). At the pleadings stage, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Therefore, if the well-pleaded factual allegations plausibly give rise to the relief sought, a court shall deny the motion to dismiss. Iqbal, 129 S.Ct. at 1950.

DISCUSSION

I. Judicial Notice

Federal Rule of Evidence 201 states that a court may take judicial notice of a fact outside the pleadings if the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001), impliedly overruled on other grounds as discussed in Gallardo v. Dicarlo, 203 F.Supp.2d 1160, 1162 n.2 (C.D. Cal. 2002). Defendants request the court take judicial notice of the following documents recorded September 20, 2010: (1) rescission of the May 3, 2010 notice of default and election to sell; (2) September 13, 2010 appointment of successor trustee; and (3) September 16, 2010 notice of default and election to sell. Each document is recorded in the Jackson County land records. Defendants' request for judicial notice (#6) is GRANTED.

II. Motion to Dismiss

Under the Oregon Trust Deed Act, "'Beneficiary' means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest" ORS 86.705(1). The trust deed at issue states:

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS.

This security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note.

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.

(Notice of Removal, Ex. 1, 8 (emphasis added).)

Although the trust deed lists MERS as the nominal beneficiary "solely as a nominee for Lender . . .," (Notice of Removal, Ex. 1, 7), the deed makes clear that MERS is not "the person for whose benefit a trust deed is given," ORS 86.705(1). Instead, the trust deed confirms that GN holds the beneficial interest. The trust deed lists GN, not MERS, as "Lender." (Notice of Removal, Ex. 1, 6.) All payments on the loan are owed to GN, not MERS. (Notice of Removal, Ex. 1, 8.) GN, not MERS, "may invoke the power of sale and any other remedies permitted by Applicable Law." (Notice of Removal, Ex. 1, 18, ¶ 22.)

While the trust deed lists MERS as the nominal beneficiary, the trust deed does not authorize MERS to take any actions on its own behalf. First, MERS holds only legal title to the trust deed. (Notice of Removal, Ex. 1, 8.) Second, MERS acts solely as

nominee for GN. (Notice of Removal, Ex. 1, 7-8.) Finally, MERS may act as GN's nominee only "if necessary to comply with law or custom[.]" (Notice of Removal, Ex. 1, 8.) The trust deed emphasizes that MERS is not the beneficiary, but rather the nominee or agent of the lender. Because the trust deed clearly demonstrates GN, and not MERS, is the person for whose benefit the trust deed was given, GN (or its successor in interest) is the beneficiary of the trust deed. ORS 86.705(1); see In re McCoy, 2011 WL 477820, at *3 (Bankr. D. Or. Feb. 7).²

That MERS was the agent or nominee of the beneficiary does not mean the non-judicial foreclosure proceedings necessarily violated Oregon law. See In re McCoy, 2011 WL 477820, at *4. As in other recent cases in this district, "The problem that defendants run into in this case is an apparent failure to record assignments necessary for the foreclosure." Burgett v. MERS, 2010 WL 4282105, at *3 (D. Or. Oct. 20); see also In re McCoy, 2011 WL 477820, at *4. In Oregon, a trustee may conduct a non-judicial foreclosure sale only if:

The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records

²The note reinforces my conclusion that plaintiffs granted the trust deed for the benefit of GN, not MERS. The note states the trust deed "protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note." (Notice of Removal, Ex. 1, 28, ¶ 11.) GN, not MERS, is the "Note Holder." (Notice of Removal, Ex. 1, 26, ¶ 1.) MERS is not mentioned in the note.

in the counties in which the property described in the deed is situated

ORS 86.735(1) (emphasis added).

Should the beneficiary choose to initiate non-judicial foreclosure proceedings, the Act's recording requirements mandate the recording of any assignments of the beneficial interest in the trust deed. Burgett, 2010 WL 4282105, at *2; In re McCoy, 2011 WL 477820, at *3. Defendants appear to argue that rather than requiring the recording of every assignment of the trust deed, the Act allows defendants to instead track every assignment of the trust deed within the MERS system, recording only the final assignment of the trust deed in the county land records. Because the Oregon Trust Deed Act requires the recording of all assignments by the beneficiary, defendants' argument fails. ORS 86.735(1); see In re McCoy, 2011 WL 477820, at *3-4.

Oregon's recording requirement is consistent with the longstanding rule that the trust deed or mortgage generally follows the note. Carpenter v. Longan, 83 U.S. 271, 274 (1872); U.S. Nat'l Bank of Portland v. Holton, 99 Or. 419, 427-29, 195 P. 823, 826 (1921) (collecting cases). As noted by defendants, "the assignment of the note automatically assigns the underlying interest in the trust deed because MERS is nominee for whichever entity is the owner (if the owner is a MERS member)." (Defs.' Reply, 10.) Defendants also state, "the content of the deed of trust itself . . . established the parties' intent that the trust

deed, and MERS' agency relationship, follow the note." (Id. at 11.) In fact, the trust deed expressly states, "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (Notice of Removal, Ex. 1, 16, ¶ 20 (emphasis added).) If there were transfers of the beneficial interest in the trust deed, defendants were required to record those transfers prior to initiating a non-judicial foreclosure in the manner provided in ORS 86.740 to 86.755. ORS 86.735(1).

Considering what is commonly known about the MERS system and the secondary market in mortgage loans, plaintiffs allege sufficient facts to make clear that defendants violated the Oregon Trust Deed Act by failing to record all assignments of the trust deed.³ Therefore, defendants' motion to dismiss is DENIED.

The record demonstrates that in addition to requiring the denial of defendants' motion to dismiss, plaintiffs are entitled to declaratory relief. Pursuant to my order, defendants submitted the MIN Summary and Milestones for the loan at issue. The MIN Summary demonstrates that on December 9, 2005, Guaranty Bank, FSB transferred the beneficial interest in the trust deed to Wells

³For background information on MERS, see generally Gerald Korngold, Legal and Policy Choices in the Aftermath of the Subprime and Mortgage FiNancing Crisis, 60 S.C. L. Rev. 727, 741-42 (Spring 2009) and Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1368-1374 (Summer 2010).

Fargo Home Mortgage. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) As noted above, the record is silent as to how or when Guaranty Bank acquired any interest in the loan. On July 15, 2006, Wells Fargo transferred the beneficial interest in the trust deed to Bank of America. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) Defendants did not record Guaranty Bank's transfer of the beneficial interest in the trust deed to Wells Fargo. Defendants' chain of title submission therefore demonstrates that defendants violated ORS 86.735(1) by initiating non-judicial foreclosure proceedings prior to recording all assignments of the trust deed in the Jackson County land records.

While I recognize that plaintiffs have failed to make any payments on the note since September 2009, that failure does not permit defendants to violate Oregon law regulating non-judicial foreclosure. The Oregon Trust Deed Act "represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor." Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp., 209 Or.App. 528, 542, 149 P.3d 150, 157 (2006). In part due to the legislature's desire "to protect the grantor against the unauthorized loss of its property," a party conducting a non-judicial foreclosure must demonstrate strict compliance with the Act. Id. As demonstrated

above, the MIN Summary demonstrates defendants failed to comply with the Oregon Trust Deed Act.

Although not affecting my conclusion here, the MIN Summary raises an additional concern relevant to numerous cases pending before me. As noted above, GN is listed as Lender on both the trust deed and the note. The MIN Summary, however, makes no mention of GN. In fact, the MIN Summary is silent as to how or when Guaranty Bank became an "Investor" holding the beneficial interest in the trust deed. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) The MIN Summary indicates only that on December 1, 2005, Guaranty Bank registered the loan in the MERS system. What occurred before registration, and how or when Guaranty Bank obtained any interest in the loan (from GN or another) is not revealed.

The apparent gap in the chain of title is not the only issue that causes me concern. On May 7, 2010, defendants recorded: (1) an assignment of the trust deed from MERS to Bank of America; (2) MERS's appointment of Northwest as successor trustee; and (3) a notice of default and election to sell. Regarding the May 7 recordings, defendants state, "After receiving plaintiffs' complaint, Northwest Trustee Services, Inc. recognized that certain documents were recorded out-of-order." (Oct. 14, 2010 Mem. Supp. Mot. Dismiss, 4.) Upon recognizing the problems - after initiating non-judicial foreclosure proceedings and only

after receiving plaintiffs' complaint alleging improper recordings - defendants rescinded the May 7, 2010 notice of default and election to sell. The "out-of-order" recordings demonstrate problems, not atypical in my view, often caused by foreclosing parties rushing to expedite non-judicial foreclosures.

On May 3, 2010, a "Vice President" of MERS assigned the trust deed to Bank of America. (Notice of Removal, Ex. 1, 32.) That same day, another "Vice President" of MERS appointed Northwest successor trustee. (Notice of Removal, Ex. 1, 34.) Also on May 3, 2010, an "Assistant Vice President" of Northwest signed the notice of default and election to sell. (Notice of Removal, Ex. 1, 36-37.) The same notary public apparently witnessed all three executives sign the documents on the same day. Considering defendants relied on the May 3, 2010 documents to justify non-judicial foreclosure proceedings, defendants' document review appears rushed. Considering the time spent reviewing the documents, assigning the trust deed, appointing a successor trustee, and issuing a notice of default and election to sell, I am not surprised to learn that "[a]fter receiving plaintiffs' complaint, Northwest Trustee Services, Inc. recognized that certain documents were recorded out-of-order."

Notwithstanding the above concerns, I note the May 3, 2010 assignment states that MERS assigns "all beneficial interest" in

the trust deed to Bank of America. (Notice of Removal, Ex. 1, 32.) As explained above, MERS never had any beneficial interest in the trust deed. MERS held only legal title as an agent or nominee of GN (or GN's successors). If MERS acted only as an agent or nominee, why is the principal not identified in the May 3, 2010 assignment? The confusion is heightened as the MIN Summary demonstrates at least two unrecorded transfers of the beneficial interest in the trust deed occurred before May 3, 2010. As Justice Page of the Supreme Court of Minnesota summarized:

MERS claims to hold legal title, but only legal title, to the mortgage being foreclosed. MERS also claims that in foreclosing mortgages it acts only as nominee for its members. But MERS can act as nominee for only the particular MERS member who holds the promissory note at any particular time and, when that promissory note is assigned between members, the member for which MERS acts as nominee, and on whose behalf MERS holds legal title, necessarily changes. In other words, the entity on whose behalf MERS holds legal title to the mortgage changes every time the promissory note is assigned.

Jackson v. Mortgage Electronic Registration Systems, Inc., 770 N.W.2d 487, 503-04 (Minn. 2009) (Page, J., dissenting). Although Justice Page wrote in dissent in a case involving a Minnesota statute, his concerns apply to numerous cases pending before me.

Foreclosure by advertisement and sale, which is designed to take place outside of any judicial review, necessarily relies on the foreclosing party to accurately review and assess its own authority to foreclose. Considering that the non-judicial

foreclosure of one's home is a particularly harsh event, and given the numerous problems I see in nearly every non-judicial foreclosure case I preside over, a procedure relying on a bank or trustee to self-assess its own authority to foreclose is deeply troubling to me.

I recognize that MERS, and its registered bank users, created much of the confusion involved in the foreclosure process. By listing a nominal beneficiary that is clearly described in the trust deed as anything but the actual beneficiary, the MERS system creates confusion as to who has the authority to do what with the trust deed. The MERS system raises serious concerns regarding the appropriateness and validity of foreclosure by advertisement and sale outside of any judicial proceeding.

Additionally, the MERS system allowed the rise of the secondary market and securitization of home loans. A lender intending to immediately sell a loan on the secondary market is not concerned with the risk involved in the loan, but with the fees generated. If a lender aims to quickly pass a loan off onto an investor, a stated-income loan appears not as an unacceptable risk, but as an income stream. MERS makes it much more difficult for all parties to discover who "owns" the loan. When a borrower on the verge of default cannot find out who has the authority to modify the loan, a modification or a short sale, even if

beneficial to both the borrower and the beneficiary, cannot occur.

When no borrowers default, the problems inherent in the MERS system may go unnoticed. Unfortunately for banks, borrowers, investors, and courts throughout the country, many borrowers are now defaulting. Countless grantors of trust deeds now face the harsh prospect of losing a home outside of any judicial proceeding. At the same time, the MERS system greatly increased the number of investors stuck holding worthless notes. A lender that knows it will immediately sell a loan on the secondary market has no incentive to ensure the appraisal of the security is accurate. Similarly, the lender need not concern itself with the veracity of any representations made to the borrower. In short, the MERS system allows the lender to shirk its traditional due diligence duties. The requirement under Oregon law that all assignments be recorded prior to a non-judicial foreclosure is sound public policy:

[I]t is apparent with the benefit of hindsight that the ability of lenders to freely and anonymously transfer notes among themselves facilitated, if not created, the financial banking crisis in which our country currently finds itself. It is not only borrowers but also other lenders who rightfully are interested in who has held a particular promissory note. For example, a lender who holds a promissory note that has become worthless may have an interest in knowing the hands through which that note passed.

Jackson, 770 N.W.2d at 504 (Page, J., dissenting). Justice Page wrote in dissent, but his views are persuasive.

15 - ORDER

EXHIBIT 9
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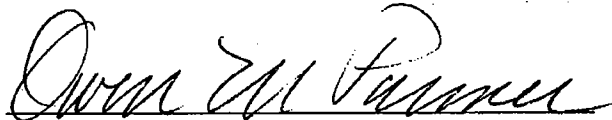
Although the concerns raised in this order appear in many foreclosure cases pending before me, I resolve the current controversy on narrow grounds. Following defendants' removal of the complaint, plaintiffs still seek declaratory relief that defendants' non-judicial foreclosure is wrongful. I agree with Judge Alley that "Oregon law permits foreclosure without the benefit of a judicial proceeding only when the interest of the beneficiary is clearly documented in a public record." In re McCoy, 2011 WL 477820, at *4. Because defendants failed to record all assignments of the trust deed, the non-judicial foreclosure proceedings violated the Oregon Trust Deed Act. Therefore, plaintiffs are entitled to declaratory relief on that claim.

CONCLUSION

Defendants' request for judicial notice (#6) is GRANTED. Defendants' motion to dismiss (#8) is DENIED. Plaintiffs are entitled to a declaratory judgment stating defendants violated ORS 86.735(1). This non-judicial foreclosure proceeding is dismissed. Judgement and costs for plaintiffs.

IT IS SO ORDERED.

DATED this 25 day of May, 2011.



OWEN M. PANNER
U.S. DISTRICT JUDGE